

DEC 8 1997

Before the
COPYRIGHT ARBITRATION ROYALTY PANELS
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In the Matter of)	
)	
Adjustment of the Rates for)	Docket No. 96-6
Noncommercial Educational)	CARP NCBRA
Broadcasting Compulsory License)	

THE PUBLIC BROADCASTERS' REPLY IN FURTHER
SUPPORT OF THEIR MOTION TO STRIKE CERTAIN
OF THE ASCAP EXHIBITS SPONSORED BY CAROL GRAJEDA

The Public Broadcasting Service ("PBS") and National Public Radio ("NPR"), in conjunction with the Corporation for Public Broadcasting ("CPB") (collectively the "Public Broadcasters"), submit this memorandum in further support of their motion to strike certain of the ASCAP exhibits sponsored by Carol Grajeda.

1. By requiring that a competent witness sponsor all documents offered by a party as part of its direct case, the rules governing this proceeding ensure that there is someone who can testify as to the relevance of each exhibit, and be subject to cross-examination on this point. ASCAP does not, and cannot, argue that Ms. Grajeda is competent to testify as to the relevance or significance of the documents she "sponsors" to the matters at issue in this proceeding; rather, ASCAP asserts that "[t]he relevance of the exhibits sponsored [by Ms. Grajeda] speaks for itself, and can be determined by the Panel." ASCAP Response at 2. None of the

exhibits attached to Ms. Grajeda's declaration (each of which was created separate and apart from this proceeding) "speaks" about its relevance to this proceeding. ASCAP, in essence, has attempted to shift its burden of establishing the relevance of the Grajeda Exhibits to the Panel. Moreover, ASCAP would require the Public Broadcasters to guess as to the purported relevance of these Exhibits in responding to them. ASCAP's attempt to side-step the rules governing the orderly introduction of evidence in this proceeding is patently improper, and thus the Grajeda Exhibits should be stricken in their entirety.¹

2. ASCAP does not dispute the Public Broadcasters' assertion that certain of the Grajeda Exhibits (other than those reflecting individual public station documents which have been incorrectly categorized by ASCAP as "party admissions" (see section 4 below)) are hearsay. Rather, ASCAP suggests inaccurately that hearsay is not an appropriate ground for striking exhibits in this proceeding.

First, the rules governing CARP proceedings

1. The Orders cited by ASCAP in support of its proffer of the Grajeda Exhibits are inapposite to the issue at hand. All of the particular testimony or documents which are the subject of these orders were sponsored by witnesses who proffered actual substantive testimony; it is because ASCAP has not offered any witness who can testify substantively regarding the Grajeda Exhibits that these exhibits should be stricken.

expressly provide that evidence may be stricken "on any proper ground including, without limitation, relevance, competency, and failure to provide underlying documents," and do not indicate that hearsay is an improper ground for exclusion. 37 C.F.R. 251.45(c)(2) (emphasis added). On the contrary, prior CARP rulings make clear that hearsay is in fact a proper ground for excluding evidence. See Order, In the Matter of Distribution of 1990, 1991 and 1992 Cable Royalty Funds, Docket No. 94-3 CARP CD 90-92 (Dec. 13, 1995).

Second, ASCAP's suggestion that the Administrative Procedures Act broadly permits the introduction of hearsay evidence is incorrect. Rather, the APA expressly provides that an arbitration panel "shall act on the basis of a fully documented written record, prior decisions of the Copyright Royalty Tribunal, prior copyright arbitration panel determinations, and rulings of the Librarian of Congress under 801(c)." 17 U.S.C. § 802(c). As such prior determinations have excluded evidence on hearsay grounds, this is an appropriate basis for striking evidence pursuant to the APA.

Moreover, as ASCAP itself recognizes, even in circumstances where hearsay evidence has been admitted in arbitration proceedings under the APA, the proffered

evidence must be "relevant, material and unrepetitious. . .
." See Veg-Mix Inc. v. U.S. Dep't of Agriculture, 832 F.2d
601, 606 (D.C. Cir. 1987). As discussed above, because Ms.
Grajeda has no substantive knowledge of the matters
reflected in the hearsay exhibits she purports to sponsor,
ASCAP has not provided the Panel with the wherewithal to
determine the relevance or materiality of these hearsay
documents.² Accordingly, these documents should be
stricken.

3. ASCAP would improperly place the onus on the
Public Broadcasters to "correct any inaccuracies [sic] that
they may feel have appeared in the [magazine and newspaper]
articles" included among the Grajeda Exhibits. The reason
such hearsay articles are inadmissible is because, absent a
witness who can testify as to their contents, the party
against whom these articles are being offered is unable to
challenge or correct any inaccuracies or misstatements
contained in them through cross-examination. See, e.g.,
Larez v. City of Los Angeles, 946 F.2d 630, 641-44 (9th Cir.
1991). It would be inappropriate and unfair in the extreme

2. The APA, in fact, requires that a party be entitled "to
conduct such cross-examination as may be required for a full
and true disclosure of the facts." 5 U.S.C. § 556(d). Such
cross-examination would not be possible if the Grajeda
exhibits are admitted into evidence, because Ms. Grajeda
cannot testify as to the substance of those exhibits.

to require the Public Broadcasters to attempt to challenge statements contained in the dozens of articles included among the Grajeda Exhibits absent any ability to cross-examine the authors who propound these statements. Thus, these articles should be stricken.

4. ASCAP's assertion that those of the Grajeda exhibits which were created by individual public television and radio stations constitute "party admissions" and thus are not hearsay is based upon the mistaken premise that these stations are parties to this proceeding. The mere fact that the Public Broadcasters are seeking fees covering performances of ASCAP and BMI music by individual public television and radio stations does not make these stations parties to this proceeding.

The Public Broadcasters have not, as ASCAP disingenuously asserts, defined themselves in prior motions in this proceeding as "PBS, NPR and the stations whom they represent." Rather, in certain motions filed in this proceeding, the "Public Broadcasters" have been defined as: "The Public Broadcasting Service ("PBS"), National Public Radio ("NPR"), and the stations on whose behalf they seek rates in this proceeding." This language reflects the reality that PBS and NPR act, if you will, as payment agents on behalf of their member stations. The individual stations

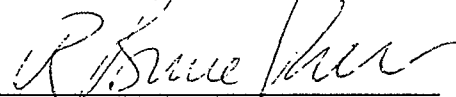
are not themselves parties to this proceeding any more than ASCAP would contend are its own individual members, simply because ASCAP is seeking fees in this proceeding on their behalf. Thus, the Grajeda Exhibits created by individual public television and radio stations do not constitute party admissions, and should be stricken as inadmissible hearsay.

5. Finally, ASCAP concedes that certain of the Grajeda Exhibits "concern information regarding third parties - mostly competitors of the Public Broadcasters." ASCAP Response at p.8, fn. 4. Since ASCAP does not seriously challenge the fact that these documents constitute inadmissible hearsay, they should be stricken.

CONCLUSION

For the foregoing reasons, and the reasons reflected in their November 14 memorandum, the Public Broadcasters respectfully request that their motion to strike certain of the ASCAP exhibits sponsored by Carol Grajeda be granted.

Respectfully submitted,



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